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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 994

SEYMOUR POLLACK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF OF PETITIONER ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BERT B. RAND
HANS A. NATHAN
WARREN E. MAGEE
1730 K Street, N.W.
Washington, D.C. 20006
Counsel for Petitioner

Washington, D. C. · THIEL PRESS · 202 · 393-0625

TABLE OF CONTENTS

REPLY TO RESPONDENT'S STATEMENT 1
REPLY TO RESPONDENT'S ARGUMENT 3
1. 3
2. 4
3. 4
4. 5
5. 7
6. 8
CONCLUSION 11

TABLE OF CASES

Ambers v. United States, No. 799 (certiorari denied, January 19, 1970) 8
Atlantic Coast Line R. Co. v. Powe, 283 U.S. 401 9
Blumenthal v. United States, 332 U.S. 539 4
Brown v. Allen, 344 U.S. 443, n. 36 (1952) 9
Coppedge v. United States, 369 U.S. 438, 82 S.Ct. 917 (1962) .. 10, 11
Dunn v. United States, 307 F.2d 833 (C.A. 5, 1962) 5
Glasser v. United States, 315 U.S. 60, 62 S.Ct. Rep. 457 2
Hamilton-Brown Shoe Co. v. Wolf. Bros. & Co., 240 U.S. 251 . 9
House v. Mayo, 324 U.S. 42 9
In Re Oliver, 333 U.S. 257, 68 S.Ct. 499 10
Janko v. United States, 366 U.S. 716, 81 S. Ct. 1662 (1961), 61-2 USTC Para. 9615 7
Krulewitch v. United States, 336 U.S. 440, 69 S.Ct. 716 (1949) 4
Ohio ex rel. Eaton v. Price, 360 U.S. 246 9
Ohio ex rel. Seney v. Swift & Co., 260 U.S. 146 9
Pereira v. United States, 347 U.S. 1 4
Price v. Johnson, 334 U.S. 266 (1948) 9
Rodriquez v. United States, 89 S.Ct. 1715 (June 2, 1969) 10
Sunal v. Large, 332 U.S. 174 9

United States v. Accardo, 298 F.2d 133 (C.A. 7, 1962) 7
United States v. Carver, 260 U.S. 482 9
United States v. Gosser, 339 F.2d 102 (C.A. 6, 1964) 3

MISCELLANEOUS

Canon 5 of Professional Ethics of A.B.A. 6
Local Rule 18 of the Court below 8, 10
Rules 2, 3, 34 and 47, Federal Rules of Appellate Procedure ... 10
Magna Carta (1641) 10
V and VI Amendments to the Constitution (1791) 10
Rule 8, Federal Rules of Criminal Procedure 3

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The manner in which Respondent has reversed and treated the questions presented warrants the filing of this Reply Brief by Petitioner in order that the important questions involved may be properly presented to this Court.

REPLY TO RESPONDENT'S STATEMENT

Petitioner argued (Pet. 9) that without proof of the existence of the conspiracy charged and without proof connecting Petitioner with that conspiracy, Respondent's evidence

concerning the substantive offenses charged in Counts 2 through 8 of the indictment concerning overt acts only, Petitioner's conviction cannot stand. Petitioner argued that *Glasser v. United States,* 315 U.S. 60, 74; 62 S.Ct. Rep. 457, 468, requires competent evidence or proof *aliunde* of the conspiracy and of Petitioner's connection with that conspiracy. Proof of later substantive overt acts is not sufficient to establish the broad and vast conspiracy charged in Count 1, which had to have been formed prior to August 26, 1965, the date when the first overt act occurred (Pet. 10; R. 11-15). The individual transactions described as overt acts in Counts 2 through 8 would be illegal only on the theory that each was part of the vast conspiracy described in Count 1, having for its purpose fraudulently obtaining monies, securities and other assets of the United Securities Life Insurance Company. Absent proof *aliunde* of the conspiracy and of Petitioner's connection with it, these open financial transactions conducted at arm's length between representatives of the corporations involved with the advice of two competent counsel, including Mr. Keith, general counsel for United, were lawful and were conducted in the regular course of business. The only persons under the allegations of the indictment who could have conspired and formed the conspiracy prior to August 26, 1965 are DeLong, President of United, and Keith, its "prominent" general counsel. But this theory failed and was demolished at the first trial because Keith was acquitted on all eight counts.

Instead of directing its Statement (Br. 2-7) to this problem and answering Petitioner's Statement, Respondent has gone into details of the substantive transactions involved in Counts 2 through 8 and has set forth *no evidence* establishing the existence of the conspiracy prior to August 26, 1965 and no evidence connecting Petitioner with that conspiracy. Respondent's Statement admits that the prosecution submitted hearsay evidence that DeLong, President of United, committed suicide (Br. 6) and evidence that Gaskin,

an alleged conspirator, had a prior conviction under the same indictment, notwithstanding that this conviction was not final because Gaskin was appealing it (Br. 8).[1]

REPLY TO RESPONDENT'S ARGUMENT

1. Respondent argues the indictment was not unduly lengthy and Petitioner is mistaken when he states the seven substantive offenses were "unrelated" (Br. 7). Respondent misconstrues Petitioner's argument. Counts 2 through 8 charge substantive offenses of unrelated crimes, like mail fraud, sale of securities in interstate commerce, use of interstate wire communication facilities and interstate transportation of securities. Obviously, the joining of such offenses in a single indictment without a conspiracy count involving all of them is not permitted under the Federal Rules of Criminal Procedure (Rule 8, F.R. of Crim. Procedure).

Absent proof *aliunde* of a conspiracy, the prejudicial joinder in a single indictment of such unrelated substantive offenses is unwarranted. This case demonstrates the evil inherent in broad conspiracy charges where strict order of proof is not required by the trial judge in the interest of justice. This lack of order of proof below resulted in a hodgepodge of evidence concerning unrelated transactions and then the evidence of these unrelated transactions was erroneously held below to establish the conspiracy. This is contrary to *Glasser.*

Respondent admits the overt acts are relied upon entirely to prove the conspiracy without any other evidence establishing it. In support of this novel position, Respondent cites *United States v. Gosser,* 339 F.2d 102, 110 (C.A. 6, 1964). We do not so read *Gosser. Gosser* holds (p. 110),

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[1]The prejudice of submitting a non-final judgment of conviction was compounded because Gaskin was acquitted on Count 2 (Docket Entries, First Section, Appendix 1, p. 3). This acquittal Respondent did *not* place before the jury.

"Once the existence of the conspiracy is clearly established, slight evidence may be sufficient to connect a defendant with it." *Gosser* discusses the evidence *aliunde* establishing the conspiracy at length. *Gosser* does not support Respondent's argument.

Respondent suggests in connection with this erroenous argument that the Court "See *Pereira v. United States*, 347 U.S. 1, 12-13" (Br. 7). *Pereira* did not hold overt acts are admissible without evidence of the conspiracy *to prove* the conspiracy and a defendant's connection with it. *Pereira* merely held (p. 12) the evidence *aliunde* in that case was sufficient to establish a conspiracy. In *Pereira* the existence of the conspiracy to defraud was not even denied! If a conspiracy is established by proof *aliunde* a person may join in the conspiracy and become a member of the conspiracy, as stated in *Blumenthal v. United States*, 332 U.S. 539, 577. *Blumenthal* does not apply because there was no evidence establishing a conspiracy and no evidence connecting Petitioner with it.

2. Respondent admits (Br. 8) that the prosecution introduced evidence that DeLong had committed suicide and that Gaskin had been convicted under the same indictment at an earlier trial, notwithstanding that Gaskin was appealing his conviction. Respondent's argument that the jury was not swayed by evidence of Gaskin's conviction and DeLong's suicide needs little comment. The prejudice of this evidence is plain. Instructions of the Court that this evidence doesn't prove Petitioner's guilt did not cure that prejudice. In reply to such an argument we quote what this Court held in *Krulewitch v. United States*, 336 U.S. 440, at 453, 69 S.Ct. 716 (1949):

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury, * * * all practicing lawyers know to be unmitigated fiction."

3. In regard to the blown up exhibits of the prosecution prepared and presented by a Government investigator, measuring up to three and one-half by five and one-half feet,

Respondent argues "Such summaries were not inflammatory hearsay" since the expert testified as to the bases for these summaries. This argument and the cases cited miss our point. These summaries contained prejudicial evidence not presented during the trial that petitioner received personally $20,000 of the "fraud" funds. Except for the decision below, we have found no case holding hearsay summaries can be received in evidence unless those summaries are based upon evidence before the jury. We assert the authorities cited in our Petition establish the inadmissibility of these summaries and the prejudice resulting from their use by placing them before the jury for the jury to examine and see during the taking of the evidence and throughout the arguments is plain.

The DeLong suicide, the Gaskin conviction and these summaries are "skunk in the jury box" and "bloody clothes" approaches vehemently condemned because they deprive the citizen of a fair trial.[2]

4. Petitioner has pointed out that the record below establishes that Respondent bottomed this prosecution on

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[2]See *Dunn v. United States*, 307 F.2d 833 (C.A. 5, 1962) which held (p. 886):

> "The paths of justice must be cut through a wilderness of facts in every case. * * * We are always concerned with guilt and innocence in criminal cases; but of equal importance is a fair trial to guilty and innocent alike. Trials are rarely, if ever, perfect, but gross imperfections should not go unnoticed. * * * It is better to follow the rules than to try to undo what has been done. Otherwise stated, one 'cannot unring a bell'; 'after the thrust of the saber it is difficult to say forget the wound'; and finally, 'if you throw a skunk into the jury box, you can't instruct the jury not to smell it.'"

In *McFarland v. United States*, 150 F.2d 593 (C.A.-D.C. 1945) the Court of Appeals said (p. 594):

> "The victim's bloodstained underclothes were not only shown to the jury but kept conspicuously displayed for several hours."

This and other prosecution conduct (p. 594) "deprived appellant of a fair trial."

the charge that 75,000 shares of stock of Fifth Avenue Industries and 75,000 shares of stock of General Holding Corporation transferred in a transaction authorized by De-Long, President of United, and approved by its general counsel Keith, had no value (Pet. 8, R. 4). Petitioner further pointed out stock market values of unlisted stocks are shown on broker's "pink sheets." These pink sheets if produced in evidence would have shown that these shares had a "bid price of $3.00 per share" (Br. 10, R. 170-171). Respondent admits this fact (Br. 10). Notwithstanding this admitted value, Respondent now argues "this value was disputed" (Br. 10). Respondent placed on the Government's hearsay summaries no value for these stocks and then showed on the summaries that United was defrauded of $639,000 (Br. 3).

Canon 5 of Professional Ethics requires prosecutors "to see that justice is done" and the "suppression of facts * * * capable of establishing innocence * * * is highly reprehensible" (Pet. 9). Actually, the pink sheets show higher values up to $3.75 or more per share near dates when the shares were acquired by United. When we multiply 150,000 shares of stock by the value shown at the time these shares of stock were acquired by United by $3.00 per share, as shown on the pink sheets, these stocks at that time had a minimum value according to the market of $450,000.00. When we multiply these 150,000 shares of stock by the demand price of $3.75 per share, as shown on the pink sheets, these stocks at that time had a demand value according to the market of $562,500.00.

Under Canon 5 it was the primary duty of Respondent to place these pink sheets in evidence as tending to establish "the innocence of the accused" and to place these values on summary sheets measuring three and one-half by five and one-half feet if "justice is to be done". Evidence after the fact that much later United's efforts to sell the stock were unsuccessful was inadmissible. Thus, in 1968 stocks on the market reached the Dow Jones 980 mark. Such stocks thus valued and used as collateral or acquired at that time cannot eighteen months later be devalued by

a person seeking to acquire or sell those stocks when they have declined down to a Dow Jones average of 744. This was the technique used by Respondent in the trial below. Yet Respondent argued to the jury and persuaded it to convict Petitioner on the theory that stocks acquired by United having a high value of $562,500.00, according to the pink sheet market reports, had *no value* because they could not be sold "later."

5. Respondent argues the fact that the jurors read a newspaper which was found in the jury room which contained prejudicial material reporting on the results of the trial involving the conviction of the prosecution witness Gaskin under the same indictment, and the suicide of DeLong, should be disregarded because none of the jurors admitted having read the newspaper article and it was "an accurate account of the trial." The reading of this article with the report of the suicide of DeLong and the conviction of Gaskin on the same charges prejudiced Petitioner. No admonitions of the Court to the jury could cure this prejudice.

> *United States v. Accardo*, 298 F.2d 133, 136 (C.A. 7, 1962);
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> *Janko v. United States*, 366 U.S. 716, 81 S. Ct. 1662 (1961).

In *Janko*, Respondent urged reversal, stating:

> "The Court of Appeals concluded that the publication of this article did not deprive petitioner of a fair trial because (a) the trial court had repeatedly warned the jurors against the reading of any such articles and (b) petitioner's counsel had rejected the opportunity of questioning the jurors directly as to whether any of them had read the article in question.
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> * * *
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> In the light of the character of the extraneous information contained in the article, we think that, before the jury was finally discharged, the trial court should have assured itself as to whether the jurors

had in fact read the article. Counsel's reluctance to have the jury questioned during the trial may be understandable. (Briggs v. United States, 221 F.2d 636, 639 (C.A. 6); Krogman v. United States, Supra, 228-229)." (Reported only at 61-2 USTC Para. 9615).

6. Respondent argues our first contention that Rule 18 of the court below is unconstitutional and is contrary to the Federal Rules of Appellate Procedure of this Court *last* (Br. 11). Our argument (Pet. 6-8) is answered by Respondent in two sentences. Respondent argues summary, secret, in chamber, closed and without oral argument proceedings on appeal contrary to the Federal Rules of Appellate Procedure do "not deprive an appellant of his right to due process or representation by counsel" (Br. 11). No authorities are cited by Respondent to support this bold statement. Instead, Respondent suggests that this Court should search its records and read Respondent's brief in *Ambers v. United States*, No. 799, (certiorari denied, January 19, 1970), implying this denial of certiorari is persuasive here as the issue of the validity of Rule 18 was "raised" in *Ambers*. Respondent Ambers' Brief was not filed with the Court herein nor served on Petitioner's counsel. This required counsel to obtain a copy of the Ambers Brief from the Clerk of this Court, subject to return. We submit, if Respondent's argument in opposition is worthy of consideration by this Court, at the very least it should appear in Respondent's Brief in this proceeding. The Solicitor General's suggestion that the Justices of this Court and Petitioner's counsel should search out an earlier argument in a Brief in another case *not decided* by this Court on the merits is presumptuous and should be disregarded.

Nevertheless, we have read Respondent's Brief (pp. 7-8) in *Ambers*. We first submit that the denial of the writ in *Ambers* was no expression by this Court on the merits and this Court has so held.[3] Turning to the merits, Respond-

[3]This Court has frequently reiterated that "the denial of a writ of certiorari imports no expression of opinion on the merits of the case

ent, except for a decision of the court below (Br. 7) in upholding its own summary Rule 18, cites only two cases, namely; *Price v. Johnson*, 334 U.S. 266, 286 (1948) and *Brown v. Allen*, 344 U.S. 443, 486, n. 36 (1952). *Price* and *Brown* are not in point. Neither holds oral argument on the *first* appellate review of a District Court conviction of crime can be eliminated by a Federal Court of Appeals and appeals can be decided in chambers in a summary manner. Both *Price* and *Brown* were decided many years prior to the adoption by this Court in 1969 of the Federal Rules of Appellate Procedure, requiring oral argument unless waived by consent of the parties.

Price discusses the discretionary power of a Court of Appeals to permit and impose restrictions on oral argument of a prisoner, among other purposes, to secure the court from danger. *Price* involved a fourth application for a writ of habeas corpus. Price was brought before the Court of Appeals *and conducted his oral argument.* A rehearing was assigned by the court *en banc.* Against this background this Court held the Court of Appeals had discretion and power to command a prisoner to be brought before it and may allow him to argue his own appeal. In *Ambers*, this Court made the statement quoted by Respondent (Br. 7) from page 286 of the opinion. Such a quotation out of context is not controlling or persuasive on the question posed in our Petition, pp. 8-12.

Brown does not deal with Federal Appellate procedure but with procedure under North Carolina law. Note 36, p. 487, cited by Respondent is a footnote discussion of appellate practices under North Carolina law where a convicted criminal files an "out-of-time review". *Brown* is not applicable here, and in any event this Court has held, con-

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as the bar has been told many times." *United States v. Carver*, 260 U.S. 482, 490; *Brown v. Allen*, 344 U.S. 443, 451-452, 491-492; *Sunal v. Large*, 332 U.S. 174, 181; *House v. Mayo*, 324 U.S. 42, 48; *Atlantic Coast Line R. Co. v. Powe*, 283 U.S. 401, 403; *Ohio ex rel Seney v. Swift & Co.*, 260 U.S. 146, 151; *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 and *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 247 (Brennan, J.).

trary to North Carolina law, in Federal Criminal proceedings, an appeal is "*a matter of right.*"

Rodriquez v. United States, 89 S.Ct. 1715, 1717 (June 2, 1969);

Coppedge v. United States, 369 U.S. 438, 441, 82 S.Ct. 917, 919 (1962).

To permit Rule 18 of the Court below to stand and to permit summary, secret and in chamber dispositions of appeals without oral argument not only is contrary to Rules 2, 3, 34 and 47 of the Federal Rules of Appellate Procedure, effective July 1, 1968, but would authorize "Star Chamber" trials barred in England since the Magna Carta (1641) and by the V and VI Amendments to the Constitution (1791). Rule 18 also bars a public hearing. We submit that what this Court said in voiding a Michigan criminal proceeding because it was conducted in a judge's chambers in secret, is applicable to and condemns Rule 18, because it authorizes in chambers a non-public summary proceeding barring argument in a criminal appeal.

In *In Re Oliver,* 333 U.S. 257, 266-270, 278; 68 S.Ct. 499, 504-506, 510, this Court held:

> "This nation's accepted practice of guaranteeing a public trial to an accused has its roots in our English common law heritage. The exact date of its origin is obscure, but it likely evolved long before the settlement of our land as an accompaniment of the ancient institution of jury trial. In this country the guarantee to an accused of the right to a public trial first appeared in a state constitution in 1776. Following the ratification in 1791 of the Federal Constitution's Sixth Amendment, which commands that 'in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * * ' most of the original states and those subsequently admitted to the Union adopted similar constitutional provisions. Today almost without exception every state by constitution, statute, or judicial decision, requires that all criminal trials be open to the public.

> The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the *lettre de cachet.* All of these institutions obviously symbolized a menace to liberty. In the hands of despotic groups each of them had become an instrument for the suppression of political and religious heresies in ruthless disregard of the right of an accused to a fair trial. Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution."
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> * * *
>
> It is 'the law of the land' that no man's life, liberty or property be forfeited as a punishment until there has been a charge fairly made and fairly tried in a public tribunal. See Chambers v. Florida, 309 U.S. 227, 236, 237, 60 S.Ct. 472, 477, 84 L.Ed. 716."

Petitioner under the law is entitled to his day in open court, including oral argument, "on the merits" in "the court first charged with the supervision of the trial court."

Coppende v. United States, supra, p. 453, p. 925.

CONCLUSION

Petitioner submits and again prays that his Petition for a Writ of Certiorari be granted and the decision below reversed.

Respectfully submitted,

BERT B. RAND
HANS A. NATHAN
WARREN E. MAGEE
1730 K Street, N.W.
Washington, D.C.
Counsel for Petitioner

February 12, 1970.